Supreme Court, U.S.
FILED

No. 10- 101056 FEB 22 2011

IN THE OFFICE OF THE CLERK

# Supreme Court of the United States

JOHN DOE, father of minor daughter, H.S.,
JANE DOE, mother of minor daughter, H.S.,
and H.S., a minor female,

*Petitioners,*

*v.*

SILSBEE INDEPENDENT SCHOOL DISTRICT,
RICHARD BAIN, JR., GAYE LOKEY,
SISSY McINNIS, DAVID SHEFFIELD,
RAKHEEM BOLTON, and CHRISTIAN ROUNTREE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

LARRY WATTS
*Counsel of Record*
WATTS & ASSOCIATES
P.O. Box 2214
Missouri City, Texas 77459
(281) 431-1500
wattstrial@gmail.com

*Attorney for Petitioners*

234720

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

Three questions are presented:

1. Whether the Fifth Circuit improperly disregarded controlling precedent of the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and its progeny by concluding that a high school cheerleader's silent refusal to publicly cheer her accused rapist during basketball games was not protected expression under the First Amendment, even when there was no reasonable forecast of a substantial disruption or any articulated pedagogical purpose by school officials.

2. Whether the Fifth Circuit improperly disregarded the no-compelled speech doctrine of the United States Supreme Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) by concluding that a high school cheerleader must cheer her accused rapist at a basketball game.

3. Whether the Fifth Circuit Court of Appeals improperly disregarded controlling precedent of the United States Supreme Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) when granting Respondents' (except Christian Rountree and Rakheem Bolton) Motions to Dismiss for Failure to State a Claim, Fed. R. Civ. P. 12(b)(6), by concluding the mutually binding Silsbee High School Cheerleader Constitution (contract) did not create a constitutionally protected property interest; and by misconstruing Texas' *Spacek v. Charles*, 928 SW2d 88, 93 (Tex. App. Houston [14th], 1996, writ

denied), which states, "actual physical injury is not required to maintain a constitutional claim," and concluding that "psychological injury alone does not constitute a violation of bodily integrity . . . ." when District Attorney Sheffield made non-prosecutorial statements to the media and illegally made non-prosecutorial statements to a prominent local attorney and the attorney's daughter, which were reasonably calculated to be, and were, disseminated throughout the community, and which disparaged H.S.' credibility in her claim of sexual assault.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF CONTENTS | iii |
| TABLE OF APPENDICES | v |
| TABLE OF CITED AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| STATEMENT OF JURISDICTION | 1 |
| STATEMENT OF THE CASE | 1 |
| STATEMENT OF FACTS | 2 |
| ARGUMENT | 6 |
| I. THE PANEL'S DECISION CONFLICTS WITH THE UNITED STATES SUPREME COURT'S DECISION IN *TINKER V. DES MOINES COMMUNITY INDEP. SCHOOL DISTRICT* AND PROGENY. | 6 |
| II. THE FIFTH CIRCUIT IMPROPERLY DISREGARDED THE NO-COMPELLED SPEECH DOCTRINE OF THE UNITED STATES SUPREME COURT IN *WEST VIRGINIA BOARD OF EDUCATION v. BARNETTE*, 319 U.S. 624 (1943). | 8 |

*Table of Contents*

*Page*

III. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE UNITED STATES'S SUPREME COURT'S DECISION IN *BOARD OF REGENTS OF STATE COLLEGES v. ROTH*, 408 U.S. 564 (1972), APPLYING TEXAS LAW TO DETERMINING CONSTITUTIONAL PROPERTY AND LIBERTY INTERESTS..... 10

CONCLUSION ..... 12

## TABLE OF APPENDICES

*Page*

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 16, 2010 ..... 1a

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION, DATED OCTOBER 7, 2009 ..... 8a

APPENDIX C — ORDER DENYING PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 22, 2010 ..... 25a

## TABLE OF CITED AUTHORITIES

*Page*

**CASES**

*Bethel School District No. 403 v. Fraser*,
478 U.S. 675 (1986) ..... 6

*Board of Regents of State Colleges v. Roth*,
408 U.S. 564 (1972) ..... 10, 11

*Hazelwood School District v. Kuhlmeier*,
484 U.S. 260 (1988) ..... 6, 8

*Morse v. Frederick*,
551 U.S. 493 (2007) ..... 6

*Spacek v. Charles*,
928 S.W.2d 88 (Tex. App. Houston [14th],
1996, writ denied) ..... 12

*Stern v. State ex rel. Ansel*,
869 S.W.2d 614 (Tex. App. Houston [14th], 1994) 4

*Tinker v. Des Moines Independent Community School District*,
393 U.S. 503 (1969) ..... 6, 7, 8

*West Virginia Board of Education v. Barnette*,
319 U.S. 624 (1943) ..... 8, 9

**STATUTES**

First Amendment ..... 1, 7, 8, 9

Fourteenth Amendment..... 1, 11

Fed. R. Civ. P. 12(b)(6)..... 1

*Cited Authorities*


| | *Page* |
|---|---|
| Tex. Code Crim. Proc. Ann. art. 20.02 (Vernon Supp. 1993) | 4 |
| 28 U.S.C. § 1254(1) | 1 |
| 42 U.S.C. § 1983 | 1 |

## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit filed September 16, 2010 is set forth as Appendix A. The unpublished opinion of the United States District Court for the Eastern District of Texas, Beaumont Division dated October 7, 2009 is set forth as Appendix B.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied a timely filed Petition for Rehearing En Banc on November 22, 2010. (App. C) The Supreme Court of the United States has jurisdiction pursuant to Title 28 U.S.C., Section 1254 (1).

## STATEMENT OF THE CASE

This is a Petition for Certiorari from the decision of the United States Court of Appeals for the Fifth Circuit affirming the trial court's order granting Respondents' Motions to Dismiss for Failure to State a Claim. Fed. R. Civ. P. 12(b)(6). Petitioners alleged a Title 42 U.S.C. § 1983 action against the Respondents in this matter arising out of events which occurred after a sexual assault of H.S. by the accused Rakheem Bolton, accompanied by Christian Rountree and a third underage male. All were students at Silsbee High School. Petitioners alleged that the Respondents Silsbee ISD, Richard Bain, Jr., Gaye Lokey, Sissy McInnis, and David Sheffield violated H.S.' First and Fourteenth Amendment rights. Those Respondents filed two motions to dismiss. The trial court granted both, dismissed Petitioners' suit, and awarded fees and costs. An

appeal was taken to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the trial court on September 16, 2010. Petitioners then filed a Petition for Rehearing En Banc, which was denied on November 22, 2010. Consequently, Petitioners file this Petition for Certiorari.

## STATEMENT OF FACTS

In the early hours of October 19, 2008, H.S., a 16-year-old female member of the Silsbee High School cheerleading squad, was pulled into a game room by three males at a post-game house party and, in the dark room, behind a locked door, was sexually assaulted or raped by a high school athlete, Rakheem Bolton ("Bolton"). When other students at the party heard H.S.' cries, they started forcing the locked door, causing Bolton and a companion, Christian Rountree ("Rountree"), to break a window and flee the house into a stand of woods behind the house. The emotional and partially disrobed H.S. was found by the rescuing students under a pool table. The host student's mother helped H.S. from under the table, then wrapped her and took her to another room. The police were called, and several officers arrived and conducted an investigation. Arrest warrants were issued for Rakheem Bolton, Christian Rountree, and their underage male companion. All three were athletes at Silsbee High School. H.S.' mother retrieved her daughter and took her to a clinic where she underwent a "rape kit" examination. H.S. was then entered into a post-sexual assault recovery program. Her therapist in that program advised her to resume her normal academic and cheerleading activities.

Bolton, Rountree, and their underage friend were arrested and placed under a state injunction restricting their proximity to H.S. and her family. Bolton and his companions were not initially indicted when a grand jury considered the matter on January 27, 2009. Two other grand juries would eventually be involved in the matter. Hardin County District Attorney David Sheffield ("Sheffield") told H.S.' father before the first grand jury deliberated that indictments were unlikely because of the accused's race; however, after the first grand jury declined to indict Bolton and Rountree, Sheffield gave a press conference announcing the grand jury's inaction, and stated: "I'm not surprised by the [no-indictment] decision after seeing the evidence I've been privy to . . . ." in clear reference to H.S. and her testimony before the Grand Jury. In at least one subsequent, social conversation, which Sheffield had with Silsbee attorney Bo Horka and Horka's daughter at Horka's office in Silsbee, Sheffield stated that, based on the evidence before the grand jury, the encounter between H.S. and Bolton and Rountree was not a criminal act, and minimized the weight of the evidence presented to the grand jury.

After hearing about Sheffield's comments to Horka from a neighbor, H.S.' father went and spoke to Horka's daughter who confirmed that "Sheffield had disclosed to both [Horka and his daughter] what had transpired before the grand jury regarding H.S., indicated that no rape [had] occurred, gave a negative spin to H.S.' complaint, indicated that [H.S.] was not credible, and inferred that H.S. was of questionable moral character in the episode." Texas statute imposes secrecy, even on the District Attorney, as relates to grand jury proceedings

and testimony.[1] *Stern v. State ex rel. Ansel*, 869 SW2d 614 (Court of Appeals Houston [14th], 1994).

Also on January 27, 2009, Silsbee Independent School District Superintendent Richard Bain, Jr. ("Bain") gave a press conference announcing that Bolton and his companions would be returning to academic and athletic activities without punishment. On or about February 17, 2009, Bolton was returned to Silsbee High School's basketball team roster.

For two games after Bolton had rejoined the Silsbee High School basketball team, the last being a post-season, playoff game in Huntsville, Texas on February 27, 2009, H.S. refused to cheer Bolton on three occasions, and stood in silence, non-disruptively, when Bolton stood alone at the "free-throw" line. During the half-time of the Huntsville game, H.S. was called by Superintendent Bain, an assistant superintendent, Silsbee High School Principal Gaye Lokey ("Lokey"), and Silsbee High School Cheerleading Sponsor Sissy McInnis ("McInnis") into a public area outside of the gymnasium, and effectively told to cheer for Bolton when he was at the free-throw line, or go home. An emotional H.S. refused to cheer for Bolton, her parents unsuccessfully protested, and then drove H.S. home to Silsbee, Texas.

On March 2, 2009, the following school day, H.S.' father (John Doe) met with Superintendent Bain, who remained adamant in his demand that H.S. cheer for Bolton. On March 4, 2009, because H.S. refused to cheer Bolton when he was at the free-throw line, Principal Lokey and Sponsor McInnis delivered a letter to H.S. immediately

---

1. Tex. Code Crim. Proc. Ann. art. 20.02 (Vernon Supp.1993)

expelling her from the cheerleading squad, which also had the effect under the Cheerleading Constitution (or contract) of banning H.S.' participation in cheerleading during the succeeding years of her enrollment at Silsbee High School.

At the time of H.S.' being censored for her refusal to cheer Bolton, the Silsbee ISD had a "Cheerleader Constitution" (or contract), which had been executed by the District, H.S., and her parents, which bound all parties and governed the terms and conditions of H.S.' continued participation on the cheerleading squad. The Cheerleader Constitution ("the Contract") promulgated a disciplinary scheme utilizing curable demerits and, for certain reasons, immediate expulsion from the squad. The Contract, set out in Petitioner's Amended Complaint, did not condition cheerleading squad membership on cheering for each individual school athlete at all times, or under all circumstances, or when other cheerleaders cheered.

After H.S. was removed from the cheerleading squad on March 4, 2009, Bolton competed for the high school basketball team on the evening of March 4, 2009 in a second post-season playoff game.

On March 2, 2009, Bolton had threatened his science teacher, and instead of expulsion which would have barred his further participation in extramural activities, Bolton was assigned a lesser discipline, "In School Suspension," which would not affect his participation in extramural athletics. Specifically Bolton was given a two-day suspension which was calculated so that he was only in ineligible for the high school's post-season basketball games on March 5 and March 6, 2009.

Conveniently, there was no game on March 5, 2009, and while there was a basketball game on March 6, 2009, the Silsbee High School school day was shortened and Bolton was able to board the team bus for the third out-of-town playoff basketball game that evening. He would have played in that March 6, 2009 game but for H.S.' father reporting the matter to the University Interscholastic League (UIL), which governs extracurricular activities in Texas, which ordered the Silsbee Athletic Director to remove Bolton from the team and pull him from the team bus before it departed Silsbee.

After Bolton had been removed from the Silsbee team by the State on March 6, 2009, Superintendent Bain relented and lifted the ban on H.S.' future participation in the subsequent year (H.S.' senior year).

## ARGUMENT

### I. THE PANEL'S DECISION CONFLICTS WITH THE UNITED STATES SUPREME COURT'S DECISION IN *TINKER V. DES MOINES COMMUNITY INDEP. SCHOOL DISTRICT* AND PROGENY.

H.S.' momentary silence was admittedly not disruptive, if silence may ever disrupt. The Fifth Circuit's decision conflicts with the Court's previous decision, *Tinker v Des Moines Independent Community School District,* 393 U.S. 503, 507 (1969), and with the subsequent decisions that set forth the exceptions to the *Tinker* rule. *See Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 271 (1988); *Bethel School District no. 403 v. Fraser,* 478 U.S. 675 (1986); and *Morse v. Frederick,* 551 U.S. 493 (2007).

In *Tinker,* the Court recognized 50 years of precedent and began by stating that First Amendment rights are available to both teachers and students, and that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. However, the Court said, "On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. . . . Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."

The *Tinker* Court found that the silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of the petitioners, and in the face of no evidence that the petitioners' interference collided with the work of the school or with the rights of other students to be secure and let alone, the wearing of the arm bands by the petitioners, was protected speech. *Id at* 508. Fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression. Here, more passive expression than H.S.' momentary silence could hardly be imagined. The court recognized that "any word spoken, in class, in the lunchroom, or on the campus that deviates from the views of another person may start an argument or cause a disturbance. **But our Constitution says we must take the risk.**" *Id.* (Emphasis added.) There is no demonstrated risk or reasonable fear of disruption provoked by a silent child who had been sexually assaulted by a male who happened to be able to trade off school discipline (which seemed appropriate under the Petitioner's plead Silsbee Code of Conduct--for

at least Bolton's documented sexual aggression, breaking a window, fleeing the scene, and murderous threats against his classmates and the homeowner), in exchange for his athletic prowess.

In this case, there was no reason to anticipate that H.S.' silent refusal to cheer for Bolton individually, while he was at the free-throw line, would interfere with the work of the school or impinge upon the rights of other students. Therefore, Petitioners in this matter did not fail to state a claim upon which relief could be granted, and it was a premature and unwarranted accommodation to Respondents to dismiss H.S.' case claiming violation of her First Amendment rights, as recognized by *Tinker*. Even if the case is deemed to fall within the rubric of *Hazelwood* as school-sponsored speech, there was no legitimate educational purpose for the school officials' egregious actions. There was no argued, nor is there any demonstrable, pedagogical purpose within the meaining of *Hazelwood* to mandate that H.S. cheer Bolton.

## II. THE FIFTH CIRCUIT IMPROPERLY DISREGARDED THE NO-COMPELLED SPEECH DOCTRINE OF THE UNITED STATES SUPREME COURT IN *WEST VIRGINIA BOARD OF EDUCATION v. BARNETTE*, 319 U.S. 624 (1943).

It is not hyperbole to state that the 16-year-old H.S. accused Bolton of having *violated her physically, emotionally and spiritually in the supporting presence of his small gang of fellow athletes.* When she cheered the Silsbee High School basketball team, she recognized that he was on its roster, but there were other members who had not assaulted her, and she cheered them. When

Bolton was ruled the victim of a game foul and rewarded with a free shot, the memory of his offense rankled H.S. and exhibited itself in silence. Bolton took his shot(s), the game went on. Superintendent Bain, the assistant superintendent, Principal Lokey, and Sponsor McInnis understood the message, and ordered that thenceforth H.S. cheer when others cheered -- for Bolton, her accused rapist, at the free-throw line.

To sustain the compulsory cheering of Bolton, the Fifth Circuit had to mis-state that the Contract conditioned H.S.' membership on the Silsbee High School cheerleading squad on cheering for Bolton individually, requiring H.S., Bolton's publicly claimed victim, to cheer Bolton when her fellow cheerleaders who were not Bolton's victims cheered for Bolton. To justify and bolster the compulsory or mandated cheering for Bolton individually, the Fifth Circuit had to conclude that H.S. was a "mouthpiece" for the school and thereby required to "utter what was not in her mind" because the Respondents demanded that further, public subjugation by H.S.

Paraphrasing *Barnette* at 642, "the action of the local authorities in compelling [H.S. to cheer her accused rapist] transcends constitutional limitations on their power and invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control."

## III. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE UNITED STATES'S SUPREME COURT'S DECISION IN *BOARD OF REGENTS OF STATE COLLEGES v. ROTH*, 408 U.S. 564 (1972), APPLYING TEXAS LAW TO DETERMINING CONSTITUTIONAL PROPERTY AND LIBERTY INTERESTS.

This Court stated in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577.

H.S. does not claim a right to enter into the Silsbee High School Cheerleader Constitution (the Contract), but having entered into that contract, to having due process before being deprived of the terms of that contract. The Fifth Circuit recognized that the Silsbee High School Cheerleader Constitution, executed by and binding upon the District, H.S. and her parents, constituted a contract. The Fifth Circuit then refused to recognize the property interest created by the Contract. Petitioner, H.S.' "property" interest in membership on the Silsbee High School cheerleading squad was created and defined by the terms of the Contract with the District. Those terms secured her interest in membership through the 2008-2009 school year, and through her high school cheerleading career to the extent that the Contract governed her removal from the cheerleading squad, which could not be continued in the subsequent school year (H.S.' senior

year) if she was terminated in membership according to the Contract's terms. *See Roth* at 578.

The Fifth Circuit's conclusion that H.S.' failure to cheer for Bolton individually at the free-throw line "constituted valid grounds for her removal from the cheer squad," (Appendix A, 5th Circuit Opinion, at 5a), does not view the facts pleaded in Plaintiffs' First Amended Complaint in a light most favorable to Petitioners. First, there was not a failure to cheer, because H.S. went to each game as scheduled with the basketball team that included the player accused of raping her. Further, the contract to cheer, which the panel recognized, did not require her to be terminated for refusing to cheer for a particular player on two occasions when he came to the free-throw line. The panel did not view the pleaded facts as true in a light most favorable to the Plaintiffs/Petitioners. Had the pleadings been properly reviewed by the 5th Circuit, Petitioner H.S. would have been clearly seen to have a contract, which created a property interest, *after she was accepted on the cheering squad.*

Like Constitutionally protected property interests, the parameters of those interests denominated "liberty" which are protected by the Fourteenth Amendment are also defined in their parameters by an independent source such as state law.

Petitioner, H.S., a minor who was sexually assaulted and was, at all times material to this claim, a patient in post-sexual assault therapy, was also in the midst of a criminal examination of her accused attacker's crime against her, albeit a first grand jury had ended its examination without returning any indictments. When

the Respondents compelled her to cheer publicly for the man she accused of raping her and caused her mental anguish, an invasion of her bodily integrity, although psychological and without physical injury, occurred. Further, the panel in this case, relying on *Spacek v. Charles*, 928 SW2d 88 (Tex. App. Houston [14th], 1996, writ denied), found that Texas law denies constitutional protection to psychological injures, unless accompanied by a physical injury. In *Spacek*, the court clarified that it was *not a corporal punishment case as stated by the Fifth Circuit in its citation*, but was, according to the Texas Court of Appeals, an excessive discipline case and found explicitly that physical injury is not required for a constitutional claim.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court grant Certiorari to review the merits of the case.

Respectfully submitted,

LARRY WATTS
*Counsel of Record*
WATTS & ASSOCIATES
P.O. Box 2214
Missouri City, Texas 77459
(281) 431-1500
wattstrial@gmail.com

*Attorney for Petitioners*

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 16, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-41075
SUMMARY CALENDAR

JOHN DOE, Father of Minor Daughter H.S.; JANE DOE, Mother of Minor Daughter H.S.; H. S., Minor Daughter of John and Jane Doe,

Plaintiffs - Appellants

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT; RICHARD BAIN, JR., Superintendent; GAYE LOKEY, Principal; SISSY MCINNIS; RAKHEEM BOLTON; DAVID SHEFFIELD,

Defendants - Appellees

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS**

**NO. 1:09-CV-374**

Before GARZA, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*:

---

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

*Appendix A*

Parents John and Jane Doe, and their minor daughter, H.S. (collectively, "Appellants"), appeal the district court's FED. R. CIV. P. 12(b)(6) dismissal of their 42 U.S.C. § 1983 claims against District Attorney David Sheffield ("Sheffield"), Silsbee Independent School District ("SISD"), Richard Bain, Jr., Gaye Lokey, Sissy McInnis (collectively, "Appellees"), and Rakheem Bolton.[1]

This claim arises from John and Jane Doe's allegation that their daughter, H.S., was sexually assaulted at a party by Bolton and Christian Rountree,[2] fellow students at H.S.'s high school. Appellants claim that after the arrest, Sheffield told them that despite having enough evidence to go to trial, the grand jury was racially divided and therefore would not vote to return an indictment against Rountree and Bolton, who were African-American. The grand jury ultimately voted against indicting Rountree and Bolton. Appellants claim that after the vote, they heard derogatory comments in the community about H.S. that indicated a detailed knowledge of the official investigation and grand jury proceedings.

As a cheerleader for SISD, H.S. was contractually required to cheer for the basketball team, whose roster included Bolton. At a February game, H.S. cheered for the team but refused to cheer for Bolton individually. As a result, Bain and Lokey told H.S. that she had either to cheer when the others cheered or to go home. H.S. chose

1. Pursuant to supplemental state law claims, Bolton is a party to this appeal. He has not filed any briefing on appeal.

2. Rountree is no longer a party to this appeal.

to leave, and McInnis subsequently removed her from the squad for the rest of the year. H.S. was permitted to try out for the squad again the following year.

Appellants originally filed a complaint under 42 U.S.C. § 1983. Appellees filed FED R. CIV. P. 12(b)(6) motions for failure to state a claim. The district court denied Appellees' motions but requested that Appellants file an amended complaint that "clearly and concisely state[d] factual allegations that support[ed] the elements of the asserted causes of action." Appellants filed an amended complaint. Appellees again moved to dismiss for failure to state a claim. This time, the district court granted the motion to dismiss. This appeal followed.

We review de novo a Rule 12(b)(6) dismissal of a claim, "accepting all well pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009) (internal quotation marks and citation omitted). FED R. CIV. P. 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A Rule 12(b)(6) dismissal for failure to state a claim is appropriate when the plaintiff has not alleged enough facts to state a claim to relief that is plausible on its face, and when the plaintiff fails to plead facts "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

*Appendix A*

To state a claim under § 1983, a plaintiff must allege that a state actor has violated "a right secured by the Constitution and laws of the United States." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). Appellants claim that Sheffield deprived H.S. of her right to freedom from bodily injury and stigmatization, which Appellants allege are protected liberty interests under the Fourteenth Amendment. Specifically, they argue that subsequent to the grand jury's decision not to indict Rountree and Bolton, Sheffield "defamed" H.S. in a press conference and illegally revealed details of the indictment hearing. Appellants are correct that "bodily integrity" constitutes a protected liberty interest under the Fourteenth Amendment. *See, e.g.*, *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450–51 (5th Cir. 1994) (holding that a student was deprived of a protected liberty interest when sexually assaulted by her teacher). However, psychological injury *alone* does not constitute a violation of bodily integrity as contemplated under the Fourteenth Amendment. *See Parham v. J.R.*, 442 U.S. 584 (1979) (involving physical confinement); *Ingraham v. Wright*, 430 U.S. 651 (1977) (involving corporal punishment); *Spacek v. Charles*, 928 S.W.2d 88 (Tex. App.—Houston 1996) (involving corporal punishment). Furthermore, freedom from false stigmatization does not constitute a protected liberty interest under the Fourteenth Amendment. Our case law "does not establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Accordingly, Appellants

have not stated valid claims for violation of any liberty interests protected by the Fourteenth Amendment.

Appellants also contend that SISD, Bain, Lokey, and McInnis deprived H.S. of a property interest protected by the Fourteenth Amendment. Specifically, they claim that H.S. had a property interest in her position on the cheer squad, and Lokey and McInnis deprived H.S. of that interest when they removed her from the cheer squad. "[S]tudents do not possess a constitutionally protected interest in their participation in extracurricular activities." *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005). Moreover, according to the terms of H.S.'s cheerleading contract, her failure to cheer constituted valid grounds for her removal from the cheer squad. Accordingly, the district court was correct in dismissing Appellants' claim for unconstitutional deprivation of property.

Appellants further argue that SISD, Bain, Lokey, and McInnis violated H.S.'s right to equal protection. Specifically, they claim H.S. was treated differently "because she is a female." "It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim." *U.S. v. Crew*, 916 F.2d 980, 984 (5th Cir. 1990) (citing *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)). Because Appellants make no showing that H.S.'s gender motivated any of Appellees' actions, their equal protection argument fails.

Appellants allege Sheffield deprived H.S. of her First Amendment right to freedom of speech by retaliating against her for filing sexual assault charges against Bolton and Rountree. However, Appellants make no showing that Sheffield's alleged retaliatory acts relate to H.S.'s accusations against Rountree and Bolton. Accordingly, the district court properly dismissed this claim on Sheffield's Rule 12(b)(6) motion.

Finally, Appellants claim SISD, Bain, Lokey, and McInnis violated H.S.'s right to free speech under the First Amendment because H.S.'s decision not to cheer constituted protected speech inasmuch as it was a symbolic expression of her disapproval of Bolton's and Rountree's behavior. Courts have long held that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 511 (1969). In order to determine whether conduct "possesses sufficient communicative elements to bring the First Amendment into play, [we] must ask whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Canady v. Bossier Parish School Board*, 240 F.3d 437, 440 (5th Cir. 2001) (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

Appellants contend the district court erred in holding that H.S. "did not convey the sort of particularized message that symbolic conduct must convey to be protected speech." Even assuming *arguendo* that H.S.'s speech was sufficiently particularized to warrant First

Amendment protection, student speech is not protected when that speech would "substantially interfere with the work of the school." *Tinker*, 393 U.S. at 509. "The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether [it] requires a school affirmatively to promote particular speech." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988). In her capacity as cheerleader, H.S. served as a mouthpiece through which SISD could disseminate speech—namely, support for its athletic teams. Insofar as the First Amendment does not require schools to promote particular student speech, SISD had no duty to promote H.S.'s message by allowing her to cheer or not cheer, as she saw fit. Moreover, this act constituted substantial interference with the work of the school because, as a cheerleader, H.S. was at the basketball game for the purpose of cheering, a position she undertook voluntarily. Accordingly, we affirm the district court's dismissal of Appellants' First Amendment claim against SISD, Bain, Lokey, and McInnis.

Neither Appellants' complaint, nor any of their subsequent filings, assert constitutional violations against Sheffield, SISD, Bain, Lokey, or McInnis upon which Appellants could plausibly recover under 42 U.S.C. § 1983. Therefore, the district court did not err in dismissing Appellants' claims. Furthermore, the district court was within its discretion to decline to exercise supplemental jurisdiction over Appellants' state law claims against Bolton.

AFFIRMED.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION, DATED OCTOBER 7, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. and C.S., for their minor daughter, H.S.,

*Plaintiffs*,

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT, et al,

*Defendants.*

CIVIL ACTION NO. 1:09-CV-374-TH
JURY

**ORDER**

Before the Court are the *Defendant's Second Motion to Dismiss* [Clerk's Docket No. 32], filed by David Sheffield ("Sheffield") on August 3, 2009; *Defendants' Amended Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted* [Clerk's Docket No.34], filed by Silsbee ISD and Richard Bain, Jr. ("Bain"), on August 7, 2009; and *Defendants' Motion to Dismiss First Amended Complaint* [Clerk's Docket No. 36], filed by Gaye Lokey ("Lokey") and Sissy McInnis ("McInnis"), on August 7, 2009. Having considered the motions, pleadings, and all applicable law, the Court **GRANTS** these motions and enters this order and memorandum opinion in support.

*Appendix B*

## I. INTRODUCTION

_____Plaintiffs, C. and C.S., are the parents of a minor daughter, H.S. They allege that their daughter was sexually assaulted by Defendants Bolton and Rountree, fellow students at her public high school, and that those defendants escaped punishment when a grand jury refused to indict them. They claim that District Attorney Sheffield should not have indicted the two boys before the mixed race grand jury, that he should have done a better job presenting the case to the grand jury by calling more witnesses, that he inappropriately discussed the case with others, and that he inappropriately held a press conference after the grand jury proceedings were completed. After the grand jury refused to return an indictment against them, the two boys (who had been put in separate facilities pending the indictment and upon H.S.' accusal) were allowed to return to school and school activities, including sports.

Later, when H.S., a cheerleader in the Silsbee public high school, refused to cheer for Bolton during varsity basketball games, she was removed from the cheerleading squad. She has since been reinstated. The Plaintiffs now sue the Defendants for violating H.S.'s "liberty" interests, her right to "symbolically protest," and her right to equal protection. The plaintiffs bring this suit under 42 U.S.C. §§ 1983 and 1988 and ask the Court to exercise supplemental jurisdiction over H.S.' sexual assault claims against Rountree and Bolton pursuant to 28 U.S.C. § 1367.

*Appendix B*

## II. BACKGROUND

H.S., Rountree and Bolton were, at the time of the events in question, high school students at Silsbee High School in the Silsbee Independent School District ("SISD"). In October of 2008, all three minors attended a party where alcohol was present. In the early morning hours, police responded to a call that H.S. had been sexually assaulted. There were no witnesses to the alleged assault but the police report indicates that two boys discovered H.S. in a darkened room, crying, and saw "several" boys run down the street. Based on statements made to police by other attendees at the party, Rountree and Bolton were arrested the next day for sexually assaulting a minor. They were indicted by District Attorney Sheffield ("Sheffield") shortly after his January investiture. Following their arrest and pending their indictment, Rountree and Bolton were placed in a separate facility, pursuant to a protective order prohibiting them from being at school with H.S. They could not partake in school activities and were unable to continue on the school football team.

The Plaintiffs allege that after their arrest Rountree and Bolton's "supporters" circulated rumors about H.S. They perceived the Administrators of SISD as being insensitive to H.S. and "more sympathetic to her rapists." Pl. Amend. Compl. 22. The Plaintiffs claim that Sheffield told them that, despite the evidence, the "black grand jurors would not vote to return an indictment against Rountree and Bolton because of the race factor." At the indictment, Sheffield called H.S. to testify as well as the Silsbee Chief of Police. He did not call other parties who

had been present at the party to testify at the indictment. Pl. Amend. Compl. 23. The grand jury did not vote to indict the two boys, referred to repeatedly as "the rapists" in the complaint. The Plaintiffs claim Sheffield was unsympathetic to them in meetings and that they "started hearing comments in the community which appeared to be derogatory of H.S. and which purported to indicate detailed knowledge of the official investigation and grand jury proceedings." Pl. Amend. Compl. 24. A neighbor told C.S. that Sheffield had discussed the case with Bo Horka, an attorney, and his daughter. Horka's daughter confirmed to C.S. that in a conversation after the grand jury proceedings, Sheffield had discussed the case and appeared dismissive of H.S.' claim of rape.

When charges were no longer pending against them, the Rountree and Bolton were allowed to return to full participation. SISD decided not to impose further disciplinary measures. As a cheerleader, H.S. was required to cheer for all the players, including Bolton, when he joined the varsity basketball team shortly after returning to school. At a February game, H.S. cheered for the team but refused to cheer for Bolton himself when he was performing alone. She chose instead to sit on the bench while the rest cheered. Bain and Assistant Superintendent Lokey ("Lokey") pulled her aside during a break and told her she had to either cheer when the others cheered or go home to Silsbee. She chose to leave with her family. A few weeks later, before two scheduled post-season basketball games, McInnis gave H.S. a letter explaining that she was removed from the squad. C.S. confronted McInnis over the decision, appealed the

decision to Bain and ultimately to the SISD Board. As a result, H.S. was permitted to try out for the team again and she is now a member of the cheerleading squad again. Rountree is no longer a SISD student but Bolton remains enrolled.

The Plaintiffs first brought suit in this Court on May 8, 2009. On July 15, 2009, this Court ordered the Plaintiffs to file a first amended complaint on or by July 24, 2009, due to the insufficiencies of their original pleading under Rule 8(a) of the Federal Rules of Civil Procedure. The Court found that the original complaint failed to clearly and concisely state factual allegations that supported the elements of the asserted causes of action; further, to an overwhelming extent, it inappropriately included speculation, rumor and irrelevant matters. The Court allowed the Plaintiffs to refile in light of the gravity of the accusations and potential rights involved. The Plaintiffs' filed their First Amended Complaint on July 24, 2009. The Court notes that the new complaint is rife with the irrelevant and often snide remarks that characterized the original complaint. The Defendants in the case have filed motions to dismiss this new complaint for failing to state any claims upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Having reviewed the motions, the first amended complaint and all applicable law, the Court grants the Defendants' motions to dismiss in their entirety.

## II. LEGAL STANDARDS

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of

the claim showing that the pleader is entitled to relief." To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, a Plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (quoting *Twombly*, 550 U.S. at 555-56) (internal quotation marks, citations and footnote omitted).

The court must accept "all well-pleaded facts as true" and must view them "in the light most favorable to the Plaintiff when considering a 12(b)(6) motion to dismiss. *Id.* (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). Rule 12(b)(6) does not permit dismissal of an action based upon a judge's disbelief in the veracity of the pleaded facts. *Neitzke v. Williams*, 490 U.S. 319, 327, (1989). Furthermore, the court accepts as true any reasonable inferences that may be drawn from the material allegations in the complaint. *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). At the same time, conclusory allegations and unwarranted factual inferences or legal conclusions are not accepted as true. *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007). In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court noted that this pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949 (citing *Twombly*, at 555).

With these standards in mind, the Court now considers the substance of the Plaintiffs' first amended complaint and the Defendants' motions to dismiss.

## III. ANALYSIS

The claims against District Attorney Sheffield are dismissed because his decisions regarding the indictment of Bolton and Rountree are within his prosecutorial discretion and his comments about H.S. did not deprive her of a recognized liberty interest. All claims against the Defendants SISD, Bain, Lokey and McInnis are dismissed because Plaintiff has failed to show that she engaged in protected First Amendment activity or was deprived of her right to due process or equal protection. Having dismissed all the Plaintiffs' federal claims, the Court shall not exercise supplemental jurisdiction over H.S.' assault and defamation claims against Bolton and Rountree.

A. The claims against District Attorney Sheffield are dismissed because his decisions regarding the indictment of Bolton and Rountree are within his prosecutorial discretion and his comments about H.S. did not deprive her of a recognized liberty interest.

1. District Attorney Sheffield is entitled to absolute prosecutorial immunity regarding his decisions to indict Rountree and Bolton before a mixed race grand jury and to call certain witnesses to testify and not other potential witnesses.

*Appendix B*

Sheffield's decisions to indict Rountree and Bolton at the time that he did and to call the witnesses he chose to call are all soundly within his prosecutorial discretion and as such are protected by his absolute prosecutorial immunity. *See United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.") (citations omitted); *see also, Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (holding that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."). Plaintiffs have complained that Sheffield indicted Rountree and Bolton before a jury "so racially prejudiced that justice could not be expected or received." Pl. Amend. Compl. 23. They allege that Sheffield warned them "that the Grand Jury was racially divided and that the black Grand Jurors would not vote to return an indictment against Rountree and Bolton because of the race factor." However, at the same time he gave them the above warning, Sheffield also commented that the evidence was strong enough to meet the probable cause standard. *Id.* In essence, the Plaintiffs ask the Court to second guess a prosecutor's decision to indict where the evidence was sufficient and where the pending charges had a daily impact on two young men's lives because of offhand, and inappropriate, comments he made to them regarding the racial composition of the jury. Plaintiffs also impugn Sheffield's decisions on which witnesses to call before the grand jury. *Id.* ("While he put forward H.S. as a witness . . . he did not call Riley or any of the persons at the party. . . . Oddly, Sheffield did invite the Silsbee Police Chief to testify, even though he did

not participate in the investigation and was beholden to City Councilman Tyler."). The Court finds that all of the complained of decisions were a part of Sheffield's initiation and presentation of the State's case and therefore entitled to absolute immunity. The claims stemming from Sheffield's conduct in preparing for and during the grand jury proceeding are hereby dismissed with prejudice.

2. District Attorney Sheffield's comments did not deprive H.S. of her liberty interest in her good reputation.

While an individual has an interest in her good name and reputation, defamation by a state official, without other, additional deprivations of protected interests, is insufficient to establish a violation of the Fourteenth Amendment's due process clause. In *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court held that a plaintiff's allegation that the police chief defamed him, by circulating a flyer on which his mug shot was displayed, was insufficient to invoke the protection of the Due Process Clause. *Id.* at 712. The Court noted that where its precedents allowed plaintiffs to vindicate damage to reputation under the Fourteenth Amendment, the damage was always intertwined with the loss of a right or status previously recognized by state law. *See id.*, at 710 (citing *Goss v. Lopez*, 419 U.S. 565 (1975) (where the Court, in holding that suspension from school based on charges of misconduct could trigger the procedural guarantees of the Due Process Clause, noted that such suspensions could seriously damage the student's reputation but relied upon the fact that Ohio law conferred a right upon all children

to attend school when it found that suspending a student without any process deprived the student of that right)). The Plaintiffs allege that Sheffield "falsely stigmatized H.S." Pl. Amend. Compl. 41. They allege that he did so in a press conference and in a social conversation. There is no allegation that Sheffield defamed H.S. while depriving her of any other recognized right or benefit under the law. Therefore, the Plaintiffs' complaint has not pleaded sufficient facts to pursue a § 1983 claim against Sheffield for deprivation of a recognized liberty interest under the Fourteenth Amendment's due process clause.

B. All claims against the Defendants SISD, Bain, Lokey and McInnis are hereby dismissed with prejudice.

1. H.S.' refusal to cheer was not protected speech.

H.S.' refusal to cheer with her team whenever Bolton performed on the basketball court was not symbolic speech. The Supreme Court has recognized that conduct, which is coupled with communicative intent, may raise First Amendment Concerns. *See Spence v. Washington*, 418 U.S. 405, 409 (1974) (finding protected speech where the appellant had [a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (finding students who wore black armbands in a school to protest the Vietnam war engaged in protected political speech). However, not all

conduct that is intended to convey a message to others is protected speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). To determine whether conduct "possesses sufficient communicative elements to bring the First Amendment into play, [the Court] must ask whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Canady v. Bossier Parish School Board*, 240 F.3d 437, 440 (5th Cir. 2001) (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410-11.). Here, the conduct at question is H.S.' public refusal to cheer for Bolton, although she cheered for the team as a whole. Pl. Amend. Compl. 30 ("She symbolically protested and expressed herself by either quietly folding her arms or going to sit by McInnis."). The message she desired to convey was "her disapproval of Bolton's and Rountree's behavior, Bolton's inclusion into a close setting with her [and] also to warn others of Bolton's dangerous propensities." *Id.* at 31. Her audience might correctly interpret her conduct as a slight to Bolton individually but the likelihood that they would understand her intent to convey his "dangerous propensities" seems low. Sitting down conveys disapproval, but not a basis for that disapproval and it is unlikely the audience would know what behavior H.S. was protesting. There is nothing in refusing to cheer that indicates one believes another is dangerous. Refusing to cheer might signal a host of problems between the cheerleader and the player from

petty to grave. H.S., therefore, did not convey the sort of particularized message that symbolic conduct must convey to be protected speech. Plaintiffs First Amendment claims are dismissed with prejudice.

2. H.S. was deprived of no protected property or liberty interests in violation of the Due Process Clause of the Fourteenth Amendment.

The Plaintiffs have not established any due process violations in their First Amended Complaint. The first step in establishing that one was entitled to due process is to establish that one was deprived of a legitimate property or liberty interest. Protected property interests are normally "created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits. *See Goss v. Lopez*, 419 U.S. 565, 572-73 (1975) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Property interests generate from an individual's "legitimate claim of entitlement to a specific government benefit" and not an "abstract need or desire" or a "unilateral expectation." *Board of Regents*, 408 U.S. at 577. Texas courts, "like the overwhelming majority of jurisdictions" have consistently held that "students do not possess a constitutionally protected interest in their participation in extracurricular activities." *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005) (quoting *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 561 (Tex. 1985); *see also, In re University Interscholastic League*, 20 S.W.3d 690, 692 (Tex. 2000) (per curiam) (holding that the disqualification of a high school from participating

in a state baseball tournament did not violate player's constitutional rights); *Eanes Indep. Sch. Dist. v. Logue*, 712 S.W.2d 741, 741 (Tex. 1986) (holding that a dispute over who had won a high school baseball playoff series did not implicate constitutional due process rights). Therefore, H.S. did not have a protected property interest in cheering and the Court need not enquire into whether she had sufficient process when she was suspended. Given the absence of a protected interest, and noting that following her suspension she was reinstated after a formal appeals process, the Court finds that the Plaintiffs have failed to plead facts sufficient to support their claim that her suspension violated her 14th Amendment right to due process.

The Plaintiffs also allege that the decision to readmit Bolton and Rountree, after the grand jury refused to indict them, deprived H.S. of liberty interests by forcing her to go to school with them again. There is a constitutional obligation to afford a student process before suspending him from a public school. *Tinker v. Des Moines Ind't Comm. School Dist.*, 393 U.S. 503 (1969). There is not, however, a reverse form of constitutionally required process owed enrolled students who desire to prevent the readmittance of suspended students. The Court refuses to find that a student has a liberty interest in objecting to the enrollment of eligible students in her public high school. The school knew of her accusations, had responded to them at the time[1] and ultimately made the decision to

1. At the time the school decided not to pursue additional disciplinary actions against Rountree and Bolton, the two boys had already spent several months away from their high school in

readmit the boys after a police investigation and a grand jury proceeding had not resulted in prosecution. There are no facts to support a finding that the school, or its officials, owed her any additional process.

3. H.S. was not subject to any arbitrary or discriminatory treatment in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Plaintiffs' complaint alleges that the Defendants generally denied H.S.' the equal protection of policies and laws because of her gender and because of "her exercise of fundamental rights." Pl. Amend. Compl. 36. Plaintiffs' do not allege that the policies of the school were facially discriminatory, rather they allege that the named officials violated H.S.' right to equal protection in their application of school policy to her. *Id.* The Equal Protection Clause exists to ensure that every person within the state's jurisdiction is free from "intentional and arbitrary discrimination." *Sonier v. Quarterman*, 476 F.3d 349, 368 (5th Cir. 2007) "It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim." *U.S. v. Crew*, 916 F.2d 980, 984 (5th Cir. 1990) (citing *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)). Plaintiffs' fail to allege any facts that support a finding of discriminatory intent, however, in the behavior

---

a separate facility, during which period they were not allowed to participate in sports or other school activities.

of the school or its officials.[2] They offer no evidence that the school or its officials were motivated to act against her because of her sex or because she was a person who exercised her fundamental rights, instead Plaintiffs allege that the Defendants were motivated by a desire to have Bolton and Rountree playing on the school's sports teams. Pl. Amend. Compl. 29 ("SISD weighed its basketball program's and Bolton's interests against H.S.'s welfare . . . ."). Therefore, Plaintiffs' equal protection claims fail.

C. The Court shall not exercise supplemental jurisdiction over H.S.' assault and defamation claims against Bolton and Rountree.

---

2. The complaint states that "Rountree and Bolton have been disparately favored by Defendants, vis a vis the treatment accorded H.S., tantamount to the denial to H.S. of equal protection." Pl. Amend. Compl. 36. They rest this claim on the fact Bolton and Rountree were not punished for their various alleged bad acts, from their attendance at the party where alcohol was served to "telling falsehoods to escape detection and obstruct justice." Pl. Amend. Compl. 35. The Plaintiffs include a litany of "reported" incidents where Bolton has escaped proper punishment. The facts plead do not show that Bolton or Rountree were favored by the school or school officials in any way. Bolton and Rountree were not allowed to be at their school for several months following the party and H.S.' accusations, they were not allowed to participate in their normal activities and they were publicly accused of a horrible crime. Yet the Plaintiffs continually present the case to the court as one where the school has heralded the accused as innocent while vilifying H.S. Under 12(b)(6), the Court adopts the facts plead in the light most favorable to the non-moving party. The Court does not, however, adopt the non-moving party's conclusory allegations as fact. Here, the facts plead do not support the vituperative theories of the Plaintiff.

*Appendix B*

Under 28 U.S.C. § 1367(c)(3), a district court "may decline to exercise supplemental jurisdiction . . . if [it] has dismissed all claims over which it has original jurisdiction . . . ." The Court has dismissed all of the Plaintiffs' federal claims and now declines to exercise supplemental jurisdiction over H.S.' assault claims against Defendants Bolton and Rountree. The claims against them are therefore dismissed.

## CONCLUSION

The ability to sue for redress when constitutional rights are violated is an important and impressive aspect of the American constitutional system. *See* 42 U.S.C. § 1983. Attorneys may litigate such violations regardless of financial loss or gain in the struggle. *See* 42 U.S.C. § 1988. It is important that attorneys remember, however, that every situation where an individual feels, correctly or incorrectly, wronged will not amount to a deprivation of that person's constitutional rights. Plaintiffs believe their daughter was injured and treated unfairly by the various Defendants. Regardless of whether their belief is correct, they have not alleged any facts that support a finding she was denied her rights under the Constitution. The Court allowed them to file an amended complaint in light of the seriousness of their belief but the amended complaint has similarly failed to set forth claims for which relief may be granted and it has retained all of the failings of the original complaint by continuously referring to irrelevant matters and including unedited conjecture in place of factual allegations. Counsel for the Plaintiffs is reminded that the majesty of the law cited in a complaint does not

excuse an attorney from meeting the most basic pleading requirements. The Defendants' motions for dismissal are hereby **GRANTED**.

It is therefore **ORDERED** that the above case is **CLOSED.**

**SIGNED** this the 7 day of **October, 2009.**

/s/

Thad Heartfield
United States District Judge

## APPENDIX C — ORDER DENYING PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 22, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN DOE, Father of Minor Daughter H.S.; JANE DOE, Mother of Minor Daughter H.S.; H. S., Minor Daughter of John and Jane Doe,

Plaintiffs - Appellants

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT; RICHARD BAIN, JR., Superintendent; GAYE LOKEY, Principal; SISSY MCINNIS; RAKHEEM BOLTON; DAVID SHEFFIELD,

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

**ON PETITION FOR REHEARING EN BANC**

(Opinion 09/16/10, 5 Cir., _____, _____, F.3d_____)

Before GARZA, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

*Appendix C*

(✓)Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]

United States Circuit Judge

184

No. 10-1056

Supreme Court, U.S.
FILED
MAR 24 2011
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

JOHN DOE, FATHER OF MINOR DAUGHTER, H. S., JANE DOE, MOTHER OF MINOR DAUGHTER, H. S., AND H. S., A MINOR FEMALE,

*Petitioners,*

*v.*

SILSBEE INDEPENDENT SCHOOL DISTRICT, RICHARD BAIN, JR., GAYE LOKEY, SISSY McINNIS, DAVID SHEFFIELD, RAKHEEM BOLTON, and CHRISTIAN ROUNTREE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS SILSBEE, TEXAS, INDEPENDENT SCHOOL DISTRICT, RICHARD BAIN, JR., SUPERINTENDENT OF SCHOOLS OF SILSBEE, TEXAS, INDEPENDENT SCHOOL DISTRICT, GAYE LOKEY, SILSBEE HIGH SCHOOL PRINCIPAL, SISSY MCINNIS, SILSBEE HIGH SCHOOL CHEERLEADER SPONSOR

TANNER T. HUNT, JR.
*Counsel of Record*
WELLS, PEYTON, GREENBERG & HUNT, L.L.P.
Century Tower, 550 Fannin, Suite 600
P. O. Box 3708
Beaumont, Texas 77704-3708
(409) 838-2644
thunt@wellspeyton.com

*Attorney for Respondents Silsbee, Texas, Independent School District, Richard Bain, Jr., Superintendent of Schools of Silsbee, Texas, Independent School District, Gaye Lokey, Silsbee High School Principal, Sissy McInnis, Silsbee High School Cheerleader Sponsor*

## QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Fifth Circuit, in affirming, per curiam, the U.S. District Court's dismissal of Petitioners' suit, pursuant to FRCP 12(b)(6) and 8(a)(2), decided an important federal question conforming to relevant decisions of this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), obviating a review on certiorari under SUP. CT. R. 10(c).

2. Whether the Fifth Circuit, in affirming, per curiam, the U.S. District Court's determination that Petitioner H. S., a cheerleader, had no constitutionally-protected First Amendment free speech right to selectively participate, or to choose not to participate, in cheers supporting only particular players on her school's team, decided an important federal question conforming to relevant decisions of this Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, (1969), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and in *United States v. O'Brien*, 391 U.S. 367 (1968).

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF APPENDICES | iii |
| TABLE OF CITED AUTHORITIES | iv |
| STATEMENT OF THE CASE | 1 |
| MISSTATEMENTS OF FACT | 3 |
| ARGUMENT | 5 |
| I. THE FIFTH CIRCUIT'S AFFIRMATION OF THE U.S. DISTRICT COURT'S DISMISSAL PURSUANT TO FRCP 12(b)(6) AND 8(a)(2) IS CONSISTENT WITH THIS COURT'S DECISIONS IN *TWOMBLY* AND *IQBAL* | 5 |
| II. THE FIFTH CIRCUIT'S AFFIRMATION OF THE U.S. DISTRICT COURT'S DISMISSAL FINDING OF NO FIRST AMENDMENT ABRIDGMENT IS CONSISTENT WITH THIS COURT'S DECISIONS IN *TINKER*, *HAZELWOOD*, AND *O'BRIEN* | 9 |
| CONCLUSION | 12 |

## TABLE OF APPENDICES

*Page*

APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION, DATED JULY 15, 2009..... 1a

## TABLE OF CITED AUTHORITIES

*Page*

**CASES**

*Ashcroft v. Iqbal*,
129 S. Ct. 1937 (2009) ..... 8, 9

*Bell Atlantic Corp. v. Twombly*,
550 U.S. 544 (2007) ..... 5, 6, 7

*Board of Regents of State Colleges v. Roth*,
408 U.S. 564 (1972) ..... 11, 12

*Canady v. Bossier Parish School Board*,
240 F.3d 437 (5th Cir. 2001) ..... 9, 10

*Conley v. Gibson*,
355 U.S. 41 (1957) ..... 6

*Doe v. Silsbee Independent School District, et al*,
No. 10-1056 (Feb. 22, 2011), No. 09-41075,
2010 U.S. App. Lexis 19368 *4 (5th Cir.,
Sept. 16, 2010) ..... 5

*Hazelwood School District v. Kuhlmeier*,
484 U.S. 260 (1988) ..... 9, 10

*In re Katrina Canal Breaches Litigation*,
495 F.3d 191 (5th Cir. 2007) ..... 6

*NCAA v. Yeo*,
171 S.W.3d 863 (Tex. 2005)..... 11

*Cited Authorities*

*Page*

*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) ..... 9, 11, 12

*United States v. O'Brien*, 391 U.S. 367 (1968) ..... 10, 12

**STATUTES**

U.S. Const. Amend I ..... 2, 9

42 U.S.C. § 1983 ..... 1, 2

42 U.S.C. § 1988 ..... 3

Sup. Ct. R. 15(2) ..... 3

Sup. Ct. R. 24.6 ..... 3, 4

Fed. R. Civ. P. 8(a)(2) ..... *passim*

Fed. R. Civ. P. 12(b)(6) ..... *passim*

## STATEMENT OF THE CASE

Petitioners, John and Jane Doe, parents, and their daughter, H. S., then a Silsbee High School Junior, filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the Eastern District of Texas, Beaumont Division, against Respondents Silsbee, Texas, Independent School District; Richard Bain, Jr., its Superintendent; Gaye Lokey, Silsbee High School Principal; and Sissy McInnis, Silsbee High School cheerleader sponsor; as well as Hardin County, Texas, District Attorney David Sheffield, and two Silsbee High School students, Rakheem Bolton, then a Junior, and Christian Rountree, then a Senior.

The claim against Silsbee ISD, Bain, Lokey and McInnis (School District Respondents) involved an incident during a Silsbee High School playoff basketball game in nearby Huntsville, Texas. Petitioner H. S. was present representing Silsbee High School as a cheerleader. Rakheem Bolton was playing for the Silsbee team.

During the previous game cheerleader sponsor McInnis had admonished H. S. that the school's cheerleader constitution required her and other cheer squad members to cheer during games for all players who were part of the team. In that game H. S. had elected not to stand or cheer with other cheer squad members when Bolton was shooting free throws. Nonetheless, on at least three occasions during the Huntsville game, and despite sponsor McInnis' earlier admonition, H. S. remained seated and silent when her fellow cheer squad members all rose and led the Silsbee student body and other supporters in cheering for Bolton at the free throw line.

When H. S. chose not to stand and cheer for Bolton, Silsbee High School students and other supporters, including Bolton's family and friends, voiced their outrage at H. S.'s conduct. Petitioner John Doe, H. S.'s father, was present as well, and his responses to those students and Bolton family members who opposed H. S.'s demonstration of disrespect produced a major disruption in the stands, eventually involving the Huntsville police. H. S. was then suspended from the cheer squad for two games. No other disciplinary action was taken against her.

Following her brief suspension from the squad, H. S., at the request of her father, was reinstated to the squad by Respondent Superintendent Bain. She was also permitted to try out for the cheer squad for the succeeding year—her senior year. She was chosen, and participated. There were no further incidents of disruption at school-sponsored events involving H. S. and Bolton. H. S. graduated last year.

Petitioners' § 1983 suit against School District Respondents is based on their claim that H. S. has a constitutionally-protected free speech right to cheer—or not to cheer, as she elects—even though she and other squad members signed a contract to cheer for all players on their school's teams at particular school-sponsored activities. Her reason for refusing to do so was personal, non-verbal, and ambiguous in intent and meaning to spectators (though obviously meant as a gesture of disrespect for team member Bolton), and cannot be categorized as protected speech. Respondents aver that she had no First Amendment right to disrupt a sanctioned school activity that was important to her fellow students, merely to express disdain for a classmate.

The U.S. District Court, after allowing Petitioners the opportunity to replead, granted Respondents' motions to dismiss under FRCP 12(b)(6), finding that Petitioners had failed to satisfy even the minimal requirements of FRCP 8(a)(2), and awarded attorney fees and costs to all School District Respondents under 42 U.S.C. § 1988.

Per curiam, the Fifth Circuit affirmed the district court's dismissal and refused en banc to grant a petition for rehearing.

## MISSTATEMENTS OF FACT

In accordance with SUP. CT. R. 15(2), Respondents address and object to the following misstatements of fact in the Petition, and to their consideration by the Court, on the grounds that they (a) are not a part of the record below; (b) are irrelevant and immaterial to the issues raised in the Petition; and (c) constitute scandalous matter, in violation of SUP. CT. R. 24.6:

1. "H. S.' mother retrieved her daughter and took her to a clinic where she underwent a 'rape kit' examination." Petition for Writ of Certiorari at 2, *Doe v. Silsbee Independent School District, et al*, No. 10-1056 (Feb. 22, 2011)

2. "H. S. was then entered into a post-sexual assault recovery program." *Id.*

3. "[H. S.]'s therapist in that program advised her to resume her normal academic and cheerleading activities." *Id.*

4. "Petitioner . . . who was . . . at all times material to this claim, a patient in post-sexual assault therapy . . ." *Id.* at 11.

In addition, Respondents object to the following misstatements of fact, and to their consideration by the Court, on the grounds that they (a) are irrelevant and immaterial to the issues raised in the Petition, and (b) refer to scandalous matter, in violation of SUP. CT. R. 24.6:

5. All references to "a sexual assault of H. S.", or to Defendant Bolton's "documented sexual aggression", or "murderous threats". *Id.* at 1, 2, 7, 8.

6. All references to Bolton's student discipline issues unrelated to H. S.'s claims. *Id.* at 5, lines 23-31.

7. "H. S. accused Bolton of having violated her physically, emotionally and spiritually in the supporting presence of his small gang of fellow athletes." *Id.* at 8.

8. ". . . the basketball team that included the player [Bolton] accused of raping [H. S.]." *Id.* at 11.

9. "Respondents compelled her [H. S.] to cheer publicly for the man [Bolton] she accused of raping her . . ." *Id.* at 12.

Further, Respondents aver that it is undisputed in the record below that prior to all events pertinent to this Petition Bolton had been no-billed by a Hardin County,

Texas, grand jury in respect of all charges brought against him by Petitioner H. S. and her parents.

## ARGUMENT

### I. THE FIFTH CIRCUIT'S AFFIRMATION OF THE U.S. DISTRICT COURT'S DISMISSAL PURSUANT TO FRCP 12(b)(6) AND 8(a)(2) IS CONSISTENT WITH THIS COURT'S DECISIONS IN *TWOMBLY* AND *IQBAL*.

The district court concluded, and the Fifth Circuit affirmed, that Petitioners, in their original and amended complaints, failed to satisfy the minimum "plausibility" standard for notice in pleadings required by FRCP 8(a)(2).

In reviewing de novo and affirming the district court's FRCP 12(b)(6) dismissal, the Fifth Circuit, per curiam and en banc, quoted this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) to the effect that plaintiff must plead sufficient facts "to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)". *Doe v. Silsbee Independent School District, et al*, No. 09-41075, 2010 U.S. App. Lexis 19368, *4 (5th Cir. Sept. 16, 2010) (unpublished).

In *Twombly*, in upholding a Rule 12(b)(6) dismissal, this Court set aside the well-established test for notice in pleadings, and introduced a new, more stringent, "plausibility" standard. Explaining the "plausibility" standard, *Twombly* noted that FRCP Rule 8(a)(2) requires that a sustainable pleading must state a claim for relief containing "... a short and plain statement of the claim

showing that the pleader is entitled to relief." *Twombly*, 550 U.S. at 555 (citing *Conley v. Gibson*, 355 U.S. 41, 47 [1957]). *Twombly* recognized the need, at the initial pleading stage, for allegations to plausibly suggest a justicible claim reflecting the threshold requirement of Rule 8(a)(2)—that the "plain statement possess enough heft to sho[w] that the pleader is entitled to relief." *Twombly*, 550 U.S. at 557.

*Twombly* found that Rule 8(a)(2) requires more than a basic notice allegation. This Court opined, "We do not require heightened fact pleadings as specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not brought their claim across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 570.

The Fifth Circuit, in *In re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007) (quoting *Twombly*), held that to survive a Rule 12(b)(6) dismissal motion a plaintiff must plead ". . . enough facts to state a claim showing that the pleader is entitled to relief." *In re Katrina*, 495 F.3d at 205. As the district court here found in its dismissal order:

> "Plaintiffs believe their daughter was injured and treated unfairly by the various Defendants. Regardless of whether their belief is correct, they have not alleged any facts that support a finding that she was denied her rights under the Constitution. The Court allowed them to file an amended complaint in light of the seriousness of their belief but the amended complaint has similarly failed to set forth claims for which relief may be granted and it has retained

> all the failing of the original complaint by **continuously referring to irrelevant matters and including unedited conjecture in place of factual allegations**." Petition for Writ of Certiorari app., *supra*, at 23a. (Emphasis supplied).

Petitioners' original and amended complaints fail to satisfy even the once-controlling notice-in-pleadings test, much less the more stringent "plausibility" test set out in *Twombly*. It is insufficient merely to assert, as Petitioners have done, that they have been wronged in some unspecified way by the School District Respondents.

In allowing Petitioners to amend its complaint in the face of school district defendants' Rule 12(b)(6) motions, the district court had found:

> "Plaintiffs' complaint is utterly insufficient, and the Court is inclined to grant dismissal. However . . . he Court will give Plaintiffs' counsel one—and only one—chance to file an amended pleading that complies with the Federal Rules of Civil Procedure, this Court's Local Rules, and the pleading standards generally applicable to federal, civil cases as set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Counsel is admonished to clearly and concisely state factual allegations that support the elements of the asserted causes of action, and to refrain from including speculation, rumor, and irrelevant matters." (Emphasis supplied). Appendix at 2a.

Petitioners' amended pleading is virtually a restatement of the original complaint, although the length of the amended (43 pages) is almost twice that of the original (23 pages). As the district court noted, the amended pleading equates to "speculation, rumor, and irrelevant matters." Petition for Writ of Certiorari app., *supra*, at 12a.

Neither the original nor the first amended complaint alleges that the cheerleading suspension resulted in a loss to the student of academic standing or other school-related opportunities, or limited her participation in other extracurricular activities. The cheerleading suspension lasted for only two games.

In *Iqbal*, this Court extended the *Twombly* "plausibility" standard to cover all civil actions, and expatiated upon that decision:

> "Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation"). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing

> more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949-50.

Petitioners' pleadings, to borrow from *Iqbal*, are "threadbare recitals," irrelevant ramblings insufficient to "unlock the doors of discovery" for these plaintiffs, "armed [as they are] with nothing more than conclusions."

## II. THE FIFTH CIRCUIT'S AFFIRMATION OF THE U.S. DISTRICT COURT'S DISMISSAL FINDING OF NO FIRST AMENDMENT ABRIDGMENT IS CONSISTENT WITH THIS COURT'S DECISIONS IN *TINKER*, *HAZELWOOD*, AND *O'BRIEN*.

In *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir., 2001), the appellate court affirmed the district court's holding that a student did not have a protected First Amendment right to violate the school district's mandatory dress code. Citing *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Fifth Circuit found: "School boards, not federal courts, have the authority to decide what constitutes appropriate behavior . . . in public schools." *Canady*, 240 F.3d at 441 (Emphasis supplied). (citing *Hazelwood*, 484 U.S. at 267)

Petitioners cite *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, (1969), in which this Court acknowledged a student's First Amendment right to political expression (arm band) if its exercise does not contribute to a disturbance in the educational environment. As the Fifth Circuit held in *Canady*, applying the *Tinker* analysis to restrictions on non-political, personal student speech activity is

inappropriate, when the speech—as here—is viewpoint-neutral. *Canady*, 240 F.3d at 443.

It is submitted that there is no protected viewpoint involved in electing to stand and cheer—or not to stand and not cheer—for one's school's basketball team members during certain times in a game, when the intention of the actor is to publicly express personal dislike for a particular team member. Such disruptive conduct constituted ambiguous, silent, personal expression that occurred in the context of a school-sponsored activity attended by many Silsbee students, their families, and other supporters. Since the cheerleader's behavior was violative of reasonable, appropriate school rules which she had agreed to abide by, Petitioner H. S. must accept the consequences—in this case, a two-game suspension from cheerleading—if she insists on defying those rules.

Although Petitioners allege that cheerleader H. S.'s conduct was "symbolic" speech intended to convey to others her disdain for her free throw-shooting classmate, the district court found that the likelihood that spectators would take that meaning from her conduct "seem[ed] low." Petition for Writ of Certiorari app., *supra*, at 18a. The silent message was not sufficiently "particularized" to convey any meaning other than her lack of regard for the student, which could run the gamut of possibilities "from petty to grave." *Id.* at 19a.

The district court in discussing Petitioners' claim cited and quoted from *United States v. O'Brien*, 391 U.S. 367, 376 (1968):

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled

> 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Petition for Writ of Certiorari app., *supra*, at 18a.

As noted, Petitioner H. S.'s conduct produced a significant disruption among her fellow students attending the game. Silsbee High School team supporters raised an outcry in protest of her disdainful behavior toward the team and one of its members. Her father, Petitioner John Doe, responded, and the Huntsville police became involved. It is submitted that H. S.'s educational environment-disrupting conduct illustrates the type of protected free speech exception this Court recognized in *Tinker*.

Such a cause of action, given the vagueness of the pleading references, does not present a plausible First Amendment claim under the decisions of this Court, as required by FRCP 8(a)(2).

The Petition also makes passing reference to H. S.'s protected property and liberty interests, without undertaking to connect those constitutional rights with Petitioners' circumstances. In response, the Fifth Circuit quoted *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Texas 2005):

> "[S]tudents do not possess a constitutionally protected interest in their participation in extracurricular activities." Petition for Writ of Certiorari app., *supra*, at 5a.

As to Petitioner's due process claim, this Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) determined that ". . . to have a property interest

in a benefit, a person clearly must have more than abstract need of or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents*, 408 U.S. at 576-577.

## CONCLUSION

The Fifth Circuit in affirming per curiam the U.S. District Court's dismissal of Petitioners' suit, pursuant to FRCP 12(b)(6) and 8(a)(2), decided the case in conformity with relevant decisions of this Court in *Twombly* and *Iqbal*, *supra*.

Further, the Fifth Circuit in affirming the district court's dismissal on the ground that Petitioner H. S. had no constitutionally-protected free speech right to cheer—or not to cheer, as she chose—for particular team members in violation of the school's cheerleader constitution, decided the case in conformity with relevant decisions of this Court in *Tinker*, *Hazelwood*, and *O'Brien*, *supra*.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

TANNER T. HUNT, JR.
*Counsel of Record*
WELLS, PEYTON, GREENBERG & HUNT, L.L.P.
Century Tower, 550 Fannin, Suite 600
P. O. Box 3708
Beaumont, Texas 77704-3708
(409) 838-2644
thunt@wellspeyton.com

*Attorney for Respondents Silsbee, Texas, Independent School District, Richard Bain, Jr., Superintendent of Schools of Silsbee, Texas, Independent School District, Gaye Lokey, Silsbee High School Principal, Sissy McInnis, Silsbee High School Cheerleader Sponsor*

# APPENDIX

## APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION, DATED JULY 15, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. 1:09-CV-374-TH
JURY

C. and C.S., for their minor daughter, H.S.,

*Plaintiffs,*

v.

SILSBEE INDEPENDENT
SCHOOL DISTRICT, et al,

*Defendants.*

### ORDER ON 12(b)(6) MOTIONS

Before the Court are *Motion to Dismiss of Defendants Silsbee Independent School District and Richard Bain, Jr. For Failure to State a Claim Upon Which Relief Can Be Granted* [Clerk's Docket No. 8], filed June 11, 2009; *Defendant David Sheffield's Motion to Dismiss* [Clerk's Docket No. 14], filed June 23, 2009; and *Motion to Dismiss of Defendants, Gaye Lokey and Sissy Mcinnis For Failure to State a Claim Upon Which Relief Can Be Granted* [Clerk's Docket No. 16], filed June 23, 2009.

In response, Plaintiffs have filed *Plaintiffs' Opposed Motion to Extend Time to File Responses to SISD Defendants' Motions to Dismiss, Motion to Strike ETC., and Motion for Attorney's Fees and Costs* [Clerk's Docket No. 18], on June 29, 2009; *Plaintiffs' Amended Opposed Motion to Extend Time to File Responses to SISD Defendants' Motions to Dismiss, Motion to Strike ETC., and Motion for Attorney's Fees and Costs* [Clerk's Docket No. 19], also on June 29, 2009; and, *Plaintiffs' Opposed Motion for Leave to File Response to David Sheffield's Motion to Dismiss* [Clerk's Docket No. 28], on June 28, 2009. In these filings, Plaintiffs' counsel does not establish good cause to excuse his late filings, but the matter is moot, as explained below.

Plaintiffs' complaint is utterly insufficient, and the Court is inclined to grand dismissal. However, out of an abundance of caution, the Court will give Plaintiffs' counsel one–and only one–chance to file an amended pleading that complies with the Federal Rules of Civil Procedure, this Court's Local Rules, and the pleading standards generally applicable to federal, civil cases, as set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Counsel is admonished to clearly and concisely state factual allegations that support the elements of the asserted causes of action, and to refrain from including speculation, rumor, and irrelevant matters. More instruction than that is beyond the Court's writ.

The Court will also grant a stay of discovery and cancel the forthcoming management conference, pending determination of the sufficiency of Plaintiffs' pleadings.

**IT IS THEREFORE ORDERED** that Defendants' *Motion to Dismiss of Defendants Silsbee Independent School District and Richard Bain, Jr. For Failure to State a Claim Upon Which Relief Can Be Granted* [Clerk's Docket No. 8], filed June 11, 2009; *Defendant David Sheffield's Motion to Dismiss* [Clerk's Docket No. 14], filed June 23, 2009; and *Motion to Dismiss of Defendants, Gaye Lokey and Sissy Mcinnis For Failure to State a Claim Upon Which Relief Can Be Granted* [Clerk's Docket No. 16], filed June 23, 2009, are all **DENIED WITHOUT PREJUDICE TO REFILING.**

**IT IS FURTHER ORDERED** that Plaintiffs shall file a first amended complaint, as set out above, on or before ***July 24, 2009.*** Defendants shall file additional 12(b)(6) motions within ten days of Plaintiffs' filing of his amended complaint, if necessary.

**IT IS FURTHER ORDERED** that *Plaintiffs' Opposed Motion to Extend Time to File Responses to SISD Defendants' Motions to Dismiss, Motion to Strike ETC., and Motion for Attorney's Fees and Costs* [Clerk's Docket No. 18]; *Plaintiffs' Amended Opposed Motion to Extend Time to File Responses to SISD Defendants' Motions to Dismiss, Motion to Strike ETC., and Motion for Attorney's Fees and Costs* [Clerk's Docket No. 19]; and, *Plaintiffs' Opposed Motion for Leave to File Response to David Sheffield's Motion to Dismiss* [Clerk's Docket No. 28] are all **DENIED AS MOOT.**

**IT IS FURTHER ORDERED** that Defendants' *Joint Motion to Defer All Discovery of Defendants Silsbee ISD and Richard Bain, Jr.; Gaye Lokey and Sissy McInnis;*

*David Sheffield; and Christian Rountree* [Clerk's Docket No. 24] is **GRANTED**. Discovery in this case is stayed pending determination of the sufficiency of the Plaintiffs' complaint.

**IT IS FURTHER ORDERED** that the management conference set for July 31, 2009 at 10 a.m. is hereby **CANCELLED**, and will be re-set, if necessary, after a determination of the sufficiency of Plaintiffs' complaint.

**SO ORDERED.**

**SIGNED** this the 15 day of **July, 2009.**

/s/
Thad Heartfield
United States District Judge

184

(3)

MAR 28 2011
OFFICE OF THE CLERK

No. 10-1056

# In the Supreme Court of the United States

JOHN DOE, FATHER OF MINOR DAUGHTER, H.S., *et al.*,
*Petitioners,*

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT, *et al.*,
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## BRIEF IN OPPOSITION

LARRY J. SIMMONS, JR.,
*Counsel of Record*
KELLI B. SMITH
B. ELIOT NEW
GERMER GERTZ, L.L.P.
550 Fannin, Suite 400
Beaumont, Texas 77701
(409) 654-6700
ljsimmons@germer.com

*Counsel for Respondent, David Sheffield*

## QUESTION PRESENTED

With respect to Respondent David Sheffield:

Whether the United States Court of Appeals for the Fifth Circuit properly affirmed the trial court's granting of Respondent David Sheffield's Motion to Dismiss for Failure to State a Claim pursuant to Federal Rule of Civil Procedure 12(b)(6), based on Petitioners' failure to plead any constitutionally-protected interest allegedly violated by Hardin County District Attorney David Sheffield.

## PARTIES TO PROCEEDING BELOW

Petitioners:

John Doe, father of minor daughter, H.S.

Jane Doe, mother of minor daughter, H.S.

H.S., minor daughter of John and Jane Doe

Respondents:

Silsbee Independent School District

Richard Bain, Jr.

Gaye Lokey

Sissy McInnis

David Sheffield

Rakheem Bolton

Christian Rountree

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

PARTIES TO PROCEEDING BELOW ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF CITED AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

STATEMENT OF FACTS ..... 1

REASONS FOR DENYING THE PETITION ..... 3

1. Texas Grand Jury Secrecy Statute Does Not Create a Protected Interest for Petitioners ..... 4

2. *Spacek v. Charles* Does Not Create a Protected Interest for Petitioners ..... 6

3. Petitioners' Alleged Reputational Injuries Are Insufficient ..... 8

CONCLUSION ..... 9

INDEX TO APPENDIX ..... 1a

APPENDIX A — Texas Code of Criminal Procedure Article 20.02 ..... 2a

## TABLE OF CITED AUTHORITIES

CASES

*Bank of Nova Scotia v. United States*, *487 U.S. 250 (1988)*..... 5

*DePree v. Sanders*, 588 F.3d 282 *(5th Cir. 2009)*..... 8

*Ingraham v. Wright*, 430 U.S. 651 (1977)..... 7

*Finn v. Schiller*, 72 F.3d 1182 (4th Cir. 1996).... 5

*Paul v. Davis*, 424 U.S. 693 (1976)..... 8

*Spacek v. Charles*, 928 S.W.2d 88 (Tex. App.—Houston [14th Dist.] 1996, writ denied) ..... 6

*Stern v. State ex rel. Ansel*, 869 S.W.2d 614 (Tex. App.—Houston [14th Dist.] 1994, writ denied)..... 4-5

*Taylor v. Doe*, 15 F.3d 443 (5th Cir. 1994)..... 7

*Tebo v. Tebo*, 550 F.3d 492 (5th Cir. 2008)..... 8

STATUTES

42 U.S.C. § 1983..... 1

TEX. CODE. CRIM. P. art. 20.02 ..... 4, 5

RULES

FED. R. CIV. P. 12 (b)(6) ..... 1

FED. R. CRIM. P. 6 ..... 5

## STATEMENT OF THE CASE

Petitioners seek a writ of *certiorari* from this Court, to review the decision of the United States Court of Appeals for the Fifth Circuit, which affirmed the trial court's order dismissing Petitioners' complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Petitioners attempted to plead section 1983 claims against Hardin County District Attorney, Respondent David Sheffield ("Sheffield"), based on comments he allegedly made following a grand jury's failure to indict two teenage males who Petitioners claim sexually assaulted H.S., a minor. Sheffield filed a motion to dismiss, but the trial court denied the motion and allowed Petitioners to re-plead their claims. After Petitioners re-plead their claims, Sheffield filed a second motion to dismiss, which the trial court granted on October 23, 2009. The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of Petitioners' complaint on September 16, 2010, concluding Petitioners failed to plead that Sheffield had violated any of Petitioners' constitutionally-protected interests. The United States Court of Appeals for the Fifth Circuit denied Petitioners' Petition for Rehearing En Banc on November 22, 2010.

## STATEMENT OF FACTS

Because the United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of Petitioners' complaint for failing to state a claim, the factual allegations in Petitioners' First

Amended Complaint must be taken as true. However, as set forth below, in their Petition for Writ of Certiorari, Petitioners mischaracterize the factual allegations in their First Amended Complaint.

Petitioners allege Respondents Rahkeem Bolton ("Bolton") and Christian Rountree ("Rountree") sexually assaulted H.S., a Silsbee High School student, while she was intoxicated at a party at a fellow high school student's home at approximately 2:30 a.m. on October 19, 2008. Record, USCA5 ("R.") at pp. 318, 321, 323-25.

It is undisputed Sheffield had not begun his term as the Hardin County District Attorney at the time of the alleged sexual assault. R. at p. 336. However, after Sheffield took office in January 2009, H.S.'s parents met with him to discuss presenting criminal charges against Bolton and Rountree to a grand jury. R. at pp. 336-37. Shortly thereafter, on January 27, 2009, Sheffield presented the case to the grand jury. R. at p. 337. Sheffield called H.S. and the police investigator to testify, but the grand jury did not indict Bolton or Rountree. R. at pp. 337, 338.

Petitioners claim Sheffield thereafter provided a statement to the Silsbee Bee newspaper, on the same day the grand jury failed to indict, in which he allegedly stated, "I'm not surprised by the [no-bill] decision after seeing the evidence I've been privy to." R. at p. 351. Although Petitioners claim that the foregoing alleged statement to the local newspaper was "in clear reference to H.S. and her testimony

before the Grand Jury" (Petitioners' Petition for Writ of Certiorari at p. 3), their claim lacks factual support because Sheffield's alleged statement did not reference H.S., indicate she testified, or identify who else testified.

Petitioners further claim Sheffield discussed the case with local attorney Bo Horka ("Horka"), in the presence of Horka's clerk, who is also Horka's daughter. R. at pp. 339, 351. Petitioners claim Horka's daughter told them, "Sheffield had acted skeptical of the rape claims and minimized the evidence of the incident, treating it not as a criminal act." R. at p. 339.

In their Petition for Writ of Certiorari, Petitioners suggest their First Amended Complaint alleges Sheffield disclosed what transpired before the grand jury to third parties. *See* Petitioners' Petition for Writ of Certiorari at p. 3. However, Petitioners' First Amended Complaint contains no such factual allegation. R. at pp. 339, 351 (discussing Sheffield's alleged statements to the Silsbee Bee and to Horka).

## REASONS FOR DENYING THE PETITION

The trial court and the United States Court of Appeals for the Fifth Circuit correctly concluded Petitioners failed to plead that Sheffield violated any of their constitutionally-protected interests. The Court should not grant the writ of *certiorari* because the decisions of the district court and the United

States Court of Appeals for the Fifth Circuit in this case: (1) do not conflict with the decision of any other United States court of appeals or any decision of the Texas Supreme Court; (2) do not depart from the accepted and usual course of judicial proceedings as to justify this Court's supervisory power; and (3) do not decide any important question of federal law that has not been, but should be, settled by this Court, or decide any important question of federal law in a way that conflicts with relevant decisions of this Court.

### 1. Texas Grand Jury Secrecy Statute Does Not Create a Protected Interest for Petitioners.

Texas Code of Criminal Procedure article 20.02 (providing for grand jury secrecy) does not create any protected interest for Petitioners. *See* TEX. CODE CRIM. P. art. 20.02, attached hereto as Appendix B. Petitioners' First Amended Complaint did not even allege facts that would constitute a violation of article 20.02. For example, the alleged statements Petitioners attribute to Sheffield do not indicate he revealed any actual evidence from the grand jury proceeding; Petitioners merely allege Sheffield commented on the grand jury's decision. *See* R. at pp. 359, 351 ("I'm not surprised by the [no bill] decision after seeing the evidence I've been privy to."; "Sheffield had acted skeptical of the rape claims and minimized the evidence of the incident, treating it not as a criminal act.").

Further, Texas courts have held that prosecutors may discuss grand jury proceedings in general terms, notwithstanding article 20.02. *Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 623-24 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Under the principles announced in *Stern*, the alleged statements attributed to Sheffield did not violate article 20.02 because Sheffield did not disclose who testified, the names of the accused or the victim, the names or identities of the grand jurors, or the opinions or votes of any of the individual grand jurors. *See id.* at 624.

Most importantly, even if Petitioners had alleged Sheffield violated article 20.02, Petitioners have no constitutionally-protected interest in the grand jury secrecy afforded by article 20.02. The statute expressly provides that the remedy for disclosing secret grand jury proceedings is limited to a finding of contempt of court. TEX. CODE CRIM. P. art. 20.02(b), attached hereto as Appendix B. Further, no state or federal court has ever found that article 20.02 creates a constitutionally-protected interest.

Moreover, this Court has found that article 20.02's federal counterpart, Federal Rule of Criminal Procedure 6, similarly creates no protected interest. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) (dismissal of indictment not an appropriate remedy because remedies limited to contempt finding, disciplinary proceedings against disclosing attorney, or public censure through written opinion); *see also Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996) (there is no independent

cause of action for a violation of Rule 6 because the only remedy is a contempt finding or an injunction).

As set forth above, Petitioners do not have a constitutionally-protected interest in grand jury secrecy. Because the United States Court of Appeals' decision finding that Petitioners had no such protected interest does not conflict with any decision of any other court, does not depart from the accepted and usual course of judicial proceedings, and does not decide any important question of federal law that has not been, but should be, settled by this Court or decide any important question of federal law in a way that conflicts with relevant decisions of this Court, *certiorari* should not be granted on this ground.

### 2. *Spacek v. Charles* Does Not Create a Protected Interest for Petitioners.

Petitioners mistakenly rely on *Spacek v. Charles* to establish that being free from psychological injury, without physical contact, is a protected interest. *See* Petitioners' Petition for Writ of Certiorari at p. 12. However, the *Spacek* court merely found a fact question whether the conduct at issue—threats of lethal violence that involved placing the student in a headlock and putting a handgun to his head—"went beyond mere words," as required to state a due process claim. 928 S.W.2d 88, 91, 93 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Although Petitioners clearly misrepresent the law from *Spacek*, a Texas intermediate court of appeals' opinion nevertheless

could not establish a constitutionally-protected interest that has never been acknowledged by this Court or the federal courts of appeals. *Compare with Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (physical corporal punishment implicates due process); *Taylor v. Doe*, 15 F.3d 443, 450-51 (5th Cir. 1994) (discussing when a physical injury has violated the substantive due process right to bodily integrity).

As set forth above, Petitioners do not have a constitutionally-protected interest in being free from psychological injury in the absence of physical contact. Accordingly, Petitioners' allegation that Sheffield inflicted a psychological injury, without any physical contact or injury, is insufficient to constitute a violation of any constitutionally-protected interest. Because the United States Court of Appeals' decision finding that Petitioners had no protected interest in being free from psychological injury absent physical contact does not conflict with any decision of any other court, does not depart from the accepted and usual course of judicial proceedings, and does not decide any important question of federal law that has not been, but should be, settled by this Court or decide any important question of federal law in a way that conflicts with relevant decisions of this Court, *certiorari* should not be granted on this ground.

### 3. Petitioners' Alleged Reputational Injuries Are Insufficient.

Petitioners' primary complaint is that Sheffield defamed or stigmatized H.S., inflicting an emotional or reputational injury. However, defamation or stigmatization, without the violation of some other tangible interest, is not a protected interest. *Paul v. Davis*, 424 U.S. 693, 701 (1976) (case law "does not establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause"); *see also DePree v. Sanders*, 588 F.3d 282, 290 (5th Cir. 2009) ("mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest"); *Tebo v. Tebo*, 550 F.3d 492, 503-04 (5th Cir. 2008) (no due process violation when public employee was stigmatized because no other protected interest implicated).

As set forth above, Petitioners have no constitutionally-protected interest in grand jury secrecy, or in being free from psychological injury in the absence of physical contact. Petitioners have failed to allege the violation of any other tangible interest sufficient to make a defamation or stigmatization injury actionable. Because the United States Court of Appeals' decision finding that Petitioners had not alleged the violation of any other tangible interest (to support a defamation or stigmatization claim) does not conflict with any decision of any other court, does not depart from the accepted and usual course of judicial proceedings,

and does not decide any important question of federal law that has not been, but should be, settled by this Court or decide any important question of federal law in a way that conflicts with relevant decisions of this Court, *certiorari* should not be granted on this ground.

## CONCLUSION

The petition for writ of *certiorari* should be denied because this case does not present any issue warranting the Court's review. As set forth above, this Court has defined the limits of Petitioners' constitutional interests, and Petitioners have failed to plead Sheffield violated any of their constitutionally-protected interests. For the foregoing reasons, Respondent David Sheffield respectfully requests that the petition be denied.

Respectfully submitted,

LARRY J. SIMMONS
*Counsel of Record*
KELLI B. SMITH
B. ELIOT NEW
GERMER GERTZ, L.L.P.
550 Fannin, Suite 400
Beaumont, Texas 77701
(409) 654-6700

*Counsel for Respondent,*
*David Sheffield*

March 28, 2011

# APPENDIX

# INDEX TO APPENDIX

APPENDIX A — Texas Code of Criminal Procedure Article 20.02 ..... 2a

## APPENDIX A — Texas Code of Criminal Procedure Article 20.02

**Proceedings Secret.**

(a) The proceedings of the grand jury shall be secret.

(b) A grand juror, bailiff, interpreter, stenographer or person operating an electronic recording device, or person preparing a typewritten transcription of a stenographic or electronic recording who discloses anything transpiring before the grand jury, regardless of whether the thing transpiring is recorded, in the course of the official duties of the grand jury shall be liable to a fine as for contempt of the court, not exceeding five hundred dollars, imprisonment not exceeding thirty days, or both such fine and imprisonment.

(c) A disclosure of a record made under Article 20.012 [relating to testimony of an accused], a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 [relating to witnesses' disclosure of their testimony] may be made by the attorney representing the state in performing the attorney's duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney's duties. The attorney representing the state shall

warn any person the attorney authorizes to receive information under this subsection of the person's duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

(d) The defendant may petition a court to order the disclosure of information otherwise made secret by this article or the disclosure of a recording or typewritten transcription under Article 20.012 as a matter preliminary to or in connection with a judicial proceeding. The court may order disclosure of the information, recording, or transcription on a showing by the defendant of a particularized need.

(e) A petition for disclosure under Subsection (d) must be filed in the district court in which the case is pending. The defendant must also file a copy of the petition with the attorney representing the state, the parties to the judicial proceeding, and any other persons required by the court to receive a copy of the petition. All persons receiving a petition under this subsection are entitled to appear before the court. The court shall provide interested parties with an opportunity to appear and present arguments for

the continuation of or end to the requirement of secrecy.

(f) A person who receives information under Subsection (d) or (e) and discloses that information is subject to punishment for contempt in the same manner as a person who violates Subsection (b).

(g) The attorney representing the state may not disclose anything transpiring before the grand jury except as permitted by Subsections (c), (d), and (e).

(h) A subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury. This subsection may not be construed to limit a disclosure permitted by Subsection (c), (d), or (e).

185 (4)

No. 10-1056

Supreme Court, U.S.
FILED
APR 12 2011
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

JOHN DOE, father of minor daughter, H.S.,
JANE DOE, mother of minor daughter, H.S.,
and H.S., a minor female,

*Petitioners,*

*v.*

SILSBEE INDEPENDENT SCHOOL DISTRICT,
RICHARD BAIN, JR., GAYE LOKEY,
SISSY McINNIS, DAVID SHEFFIELD,
RAKHEEM BOLTON, and CHRISTIAN ROUNTREE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## REPLY BRIEF

LARRY WATTS
*Counsel of Record*
WATTS & ASSOCIATES
P.O. Box 2214
Missouri City, Texas 77459
(281) 431-1500
wattstrial@gmail.com

*Attorney for Petitioners*

235615

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

# TABLE OF CONTENTS

*Page*

TABLE OF CONTENTS ..... i

TABLE OF CITED AUTHORITIES ..... ii

SISD'S MISSTATEMENTS OF FACT ..... 7

CLAIMED MISSTATEMENTS OF FACT AND SCANDALOUS MATTER..... 9

## TABLE OF CITED AUTHORITIES

*Page*

### CASES

*Board of Regents v. Roth*,
408 U.S. 564 (1972) ..... 6

*NCAA v. Yeo*,
171 S.W.3d 863 (Texas 2005) ..... 4

*Spacek v. Charles*,
928 S.W.2d 88 (Tex. App.--Houston
[14th] 1996) ..... 6

### STATUTES

Tex. Code Crim. Proc. Art. 20.02 ..... 6

Respondents to Petitioners' Petition for Certiorari are Silsbee Independent School District ("SISD"), Superintendent Richard Bain, Jr. ("Bain"), (former) Silsbee High School Principal Gaye Lokey ("Lokey"), (former) Cheerleader Sponsor Sissy McInnis ("McInnis"), and Hardin County District Attorney David Sheffield ("Sheffield"). SISD, Bain, Lokey, and McInnis are cumulatively referred to as "SISD."

Petitioners alleged the Respondents violated the First and Fourteenth Amendments to the United States Constitution.

The First Amendment claim is in two parts. As to SISD, Petitioners claim H.S.' protected expression of withholding cheers for Rakheem Bolton ("Bolton") at the free-throw line on February 27, 2009 was unconstitutionally restricted. Bolton and Christian Rountree ("Rountree") were not indicted on January 27, 2009, but both were indicted on November 24, 2009 for sexual assault of a minor (Plaintiffs'/Appellants' Opposed Motion to Take Judicial Notice on Appeal Pursuant to FRE 201; and Per Curiam Order granting the motion for judicial notice). The matters of this case occurred after Bolton and Rountree were not indicted by the first grand jury on January 27, 2009 but before both were indicted by the following grand jury in November 2009. As to Sheffield, Petitioners claim he retaliated against H.S. by stigmatizing her as having falsely claimed sexual assault by Bolton because of Sheffield's political relationship with Bolton's relative, Silsbee City Councilman Thomas Tyler.

On the week of February 16, 2009, Bolton was announced to have been selected to play on Silsbee High

School's basketball team. (Plaintiffs' First Amended Complaint, pg. 29 at ¶X5.) H.S.' father met with Bain on February 17, 2009, seeking unsuccessfully an accommodation which would insulate H.S. from Bolton. (*Id.*, pg. 30 at ¶B6.) At the following game, H.S. was faced with the decision of whether to cheer for the man she had accused of raping/sexually assaulting her, and against whom she had testified. Confronting the circumstances of his appearance and his presence, H.S., while cheering for the team, chose not to cheer when Bolton stood alone at the free-throw line. (*Id.*, ppg. 29-30 at ¶¶Y5-Z5.)

On February 27, 2009, at a post season and out-of-town game, H.S. again cheered for the team as a whole, but stood silent or sat quietly by McInnis when Bolton stood alone at the free-throw line. (*Id.*, pg. 30-31 at ¶C6.) There was no disruption of the game or ongoing academic processes. (*See Id.*, ppg. 30-31 at ¶¶Z5, C6, pg. 36 at ¶A7(2)(b), pg. 39 at ¶F7(2), pg. 41 at ¶C.) H.S. was called from the gym and told that she must endorse Bolton with her cheers or go home to Silsbee (*Id.*, pg. 31 at ¶¶D6-F6), approximately 100 miles away (not "nearby").

As generally recognized by the Court of Appeals and conceded by SISD, H.S. and her parents had entered into a written contract with the SISD. That contract specifically governed H.S.' conduct, discipline, and conditions of removal from the cheerleading squad, and did not condition H.S.' squad membership on cheering for players such as Bolton when at the free-throw line. (*See Id.*, ppg. 4-8 at ¶¶E-L, O-P.)

To be protected, speech or conduct must have a message. The Court of Appeals assumed for the purposes

of argument that, when remaining silent while her accused attacker, Bolton, tossed the basketball from the foul line, H.S.' conduct on February 27, 2009 had a message. (Petition for Writ of Certiorari, Appendix ["Pet. App."], ppg. 6a-7a.) SISD, in their Brief in Opposition ("SISD BIO"), says the message was "disdain" for Bolton and, inferentially, his inclusion on the team. Student speech is not protected and may be restricted only if it substantially interferes with the work of the school or requires a school to promote speech which may be inconsistent with an identified, legitimate pedagogical purpose.

The Court of Appeals, while assuming that H.S.' conduct carried an understandable message, said H.S. was the mouthpiece of the school, contractually bound to cheer for Bolton, and her refusal to do so was disruptive. (Pet. App., ppg. 5a, 7a.) There was no other attempt to locate or fashion a legitimate pedagogical purpose.

In their BIO, SISD embellished and trivialized the facts. They embellished "disruption" by arguing variously H.S.' conduct or her father, Petitioner John Doe, caused spectator outrage and substantial disruption in the stands, when the record and any allowable sources are to the contrary. SISD trivializes by saying H.S. was only suspended for two games, when in fact she was removed from the team, by the rules which meant expulsion forever. The *forever* was reversed by Bain when Bolton's planned team appearances were cut short by the UIL on March 6, 2009, and Bolton's judicial probation for truancy was revoked on March 12, 2009, leaving nothing for Bolton to do athletically at Silsbee High School. It is a reasonable inference that Bain, who had sustained H.S.' *removal*--not suspension--from the cheerleading squad, reversed

himself on the logic, "Might as well let her try out for next year, since there's nothing else Bolton can do this year." Since there was no disruption occasioned by H.S.' conduct in the record or from any allowable source, and H.S. was not contractually bound to cheer for Bolton at the free-throw line--or cheer all the time under all circumstances--then SISD unconstitutionally restricted her speech and conduct. SISD's claims of contractual obligation to cheer and disruption in the stands are disingenuous post-event constructions.

Petitioners' Fourteenth Amendment or due process and equal protection claims, as to SISD, are that H.S. had a constitutionally protected interest in the document recognized by the Court of Appeals and SISD to be a binding contract. While the Court of Appeals was erroneously persuaded by SISD that the cheerleading contract contained language not in the record and which conditioned H.S.' squad membership on cheering for Bolton at the free-throw line, the protected interest claimed by H.S. was not a subjective or abstract *desire to participate* in the extracurricular activity of cheerleading, but objective and tangible expectation of benefit in *the contractual terms and conditions governing her discipline and removal* from the cheerleading squad. The Court of Appeals' reliance on *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Texas 2005) is inapposite.

As for the equal protection claims against SISD, H.S. claimed disparate treatment of H.S. *vis a vis* Bolton. Bolton was an adjudicated truant, accused of sexually assaulting H.S. and breaking a window in the Riley house to escape (with Rountree), who had lied to cover up his guilt, threatened to kill others, and threatened his teacher,

Dr. Shae Robinson, on March 2, 2009 with his "AK47." (*Id.*, pg. 16 at ¶J3, pg. 31 at ¶¶G6-H6, ppg. 34-36 at ¶¶T6, X6-Y6.) For his misconduct, SISD policies and rules were not followed, to Bolton's benefit, and his punishment for threatening Dr. Robinson on March 2, 2009 was reduced to two days of in-school suspension. That "punishment" started on March 5, 2009 *after* Bolton had played in the March 4, 2009 game, and so arranged that, with a shortened school day on March 6, 2009, he was able to board the team bus for that day's game. (*Id.*, ppg. 31-36 at ¶¶G6-J6, O6[2]-Q6, T6, X6, Y6.)

Petitioners also claim that H.S. had a protected interest, as to SISD, as a minor who had been a victim of a sexual assault (by Bolton), to be free from false stigmatization (as having falsely reported the assault), coupled with SISD's exacerbation of H.S.' psychological harm, by publicly compelling her to publicly cheer her claimed attacker (who was still under investigation and would be subsequently indicted).

Petitioners claim that H.S. had a protected interest, as to Sheffield, as a minor who had been a victim of sexual assault (by Bolton), to be free from false stigmatization (as having falsely reported the assault) through thinly veiled criticism of her credibility to the newspaper (Plaintiffs' First Amended Complaint, pg. 37 at ¶C7(1)), and dispersal into the community by Horka (*Id.*, ppg. 24-25 at ¶¶D5-I5), coupled with deprivation of H.S.' legally imposed privacy as a witness and victim before a grand jury. It may be reasonably inferred that Sheffield (a trained prosecutor), who was arguably interested in benefiting Bolton, the family member of a political supporter, from future indictment, would violate notorious statutory

proscriptions and dismiss the victim's claim of the crime. There was no legitimate prosecutorial function behind Sheffield's actions. There was no reason for Sheffield to emphasize his view of Bolton's innocence and H.S.' unfounded charge in his post-grand jury comments to the newspaper and the Horkas, other than the emphasis of Bolton's innocence and H.S.' unbelievability.

H.S. urges Tex. Code Crim. Proc. Art. 20.02 is the source of a tangible (privacy) interest which, when coupled with governmental stigmatization imposes liability.

Petitioners claim that H.S. had a protected interest, as to Sheffield, as a minor who had been a victim of sexual assault (by Bolton), to be free from false stigmatization (as having falsely reported the assault) coupled with further intended psychological harm (at the hands of Sheffield) by being publicly discredited as having falsely cried rape or sexual assault.

*Board of Regents v. Roth*, 408 U.S. 564 (1972) and its progeny state that the protected interests and the protected parameters thereof are found in state law, etc. Texas law, although perhaps idiosyncratic to other law, states that physical injury is not required for a protected right to exist. *Spacek v. Charles*, 928 S.W.2d 88 (Tex. App.--Houston [14th] 1996).

## SISD'S MISSTATEMENTS OF FACT

"[A]ll well pleaded facts" stated in [Petitioners'] First Amended Complaint are to be taken "as true and viewed in the light most favorable to the [Petitioners]." (Pet. App., pg. 3a.) In their BIO, SISD states, without any referencing citation and allowable record support, the following, and Petitioners respond:

1. SISD states, "During the previous game [at the February 27, 2009 game at the Huntsville venue] *cheerleader sponsor McInnis had admonished H.S.* that the *school's cheerleader Constitution required her* . . . to cheer during games for all players who were part of the team." (SISD BIO, pg. 1.) (Emphasis added.)

   **Petitioners respond:**

   No fact pleaded in Petitioners' amended complaint, or found in allowable proof otherwise supplied, supports the proposition that H.S. was contractually required to cheer for Bolton when at the free-throw line, lest she be removed from the cheerleading squad. (*See* Plaintiffs' First Amended Complaint, ppg. 4-9 at ¶¶E-F, H-I, K-L[2][1], O-S.)

2. SISD states, "On *at least three occasions* during the Huntsville game, and despite *sponsor McInnis' earlier admonition*, H.S. remained seated and silent . . . ." (SISD BIO, pg. 1.) (Emphasis added.)

---

1. A paragraph numbering error resulted in two consecutive paragraphs being designated "L." For purposes of this brief, the first is referred to as "L[1]" and the second is referred to as "L[2]."

**Petitioners respond:**

No fact pleaded in Petitioners' amended complaint or found in allowable proof otherwise supplied supports SISD's statement that H.S. was previously admonished for her silent, non-disruptive expression. (*See* Plaintiffs' First Amended Complaint, ppg. 29-30 at ¶¶Y5-B6.)

3. SISD states, "When H.S. chose not to stand and cheer for Bolton, Silsbee High School *students and other supporters, including Bolton's family and friends, voiced their outrage at H.S.'s conduct.* Petitioner John Doe, H.S.'s father, was present as well, and *his responses to those students and Bolton family members who opposed H.S.'s demonstration of disrespect produced a major disruption in the stands, eventually involving the Huntsville police.*" (SISD BIO, pg. 2.) (Emphasis added); and "As noted, Petitioner *H.S.'s conduct produced a significant disruption* among her fellow students attending the game. Silsbee High School *team supporters raised an outcry in protest of her disdainful behavior toward the team and one of its members.* [H.S.'] father, *Petitioner John Doe, responded, and the Huntsville police became involved. . . . H.S.'s educational environment-disrupting conduct . . . .*" (*Id.*, pg. 11.) (Emphasis added).

**Petitioners respond:**

No fact pleaded in Petitioners' amended complaint or found in allowable proof otherwise supplied supports SISD's claim that H.S.' silent, symbolic protest caused *any* disruption or outcry in the audience at

the basketball game. (*See* Plaintiffs' First Amended Complaint, ppg. 30-31 at ¶¶C6-F6.)

4. SISD states, "H.S. was then *suspended from the cheer squad for two games*. No other disciplinary action was taken against her. Following her *brief suspension from the squad*, H.S., at the request of her father, was reinstated to the squad by Respondent Superintendent Bain." (SISD BIO, pg. 2.) (Emphasis added.)

**Petitioners respond:**

No fact pleaded in Petitioners' amended complaint or found in allowable proof otherwise supplied supports SISD's argument that H.S. was "suspended" briefly for only two games. H.S. was removed from the cheerleading squad, which had the effect of removing her for the balance of her school career. When Bolton was kept from playing the March 6, 2009 post-season game and his truancy probation revoked on March 12, 2009, Bain reversed and lifted the ban on H.S.' future participation with the cheerleading squad. (*See* Plaintiffs' First Amended Complaint, ppg. 32-33 at ¶¶L6-N6, ppg. 34-35 at ¶¶P6-T6, W6.)

## CLAIMED MISSTATEMENTS OF FACT AND SCANDALOUS MATTER

SISD object to four statements by Petitioners which they claim are not part of the record, as well as being being "misstatements of fact," and "irrelevant and immaterial to the issues raised in the Petition, and . . . refer[ring] to scandalous matter." (SISD BIO, ppg. 3-4.) The claimed "misstatements" are good faith, reasonable paraphrases of paragraphs in Petitioners' amended complaint, which

relate to H.S.' claims and are part of the record. (*See* Plaintiffs' First Amended Complaint, ppg. 17-18 at ¶O3, pg. 26 at ¶L5-M5.)

SISD claim that five other references are "scandalous" and "irrelevant and immaterial to the issues raised in the Petition . . . ." (SISD BIO, pg. 4.) Petitioners respond that the genesis of this action was the claimed rape/sexual assault of H.S. on October 18, 2009, and that indictments, although not returned by the first grand jury on January 27, 2009, were subsequently returned against Bolton and Rountree by a grand jury in November 2009, which indictments the Court of Appeals noticed on motion by Petitioners. (*See* Plaintiffs'/Appellants' Opposed Motion to Take Judicial Notice on Appeal Pursuant to FRE 201; and Per Curiam Order granting the motion for judicial notice.) The matters claimed are not scandalous and relate to H.S.' claims against Respondents and other defendants, and the background of the claims.

SISD's objections should be denied. The petition for writ of certiori should be granted.

Respectfully submitted,

LARRY WATTS
*Counsel of Record*
WATTS & ASSOCIATES
P.O. Box 2214
Missouri City, Texas 77459
(281) 431-1500
wattstrial@gmail.com

*Attorney for Petitioners*